No. 900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NELLO L. TEER COMPANY, *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA AS AMICUS CURIAE

TRAVIS BROWN
1967 E Street, N. W.
Washington, D. C. 20006
Counsel for the Associated General Contractors of America

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INTRODUCTION

The Associated General Contractors of America submits this brief as *amicus curiae* in support of the granting of the petition because of the concern of its membership in this matter. Permission to file a brief was granted pursuant to consent of the parties under Rule 42(1).

The Associated General Contractors of America (herein referred to as the AGC) is a national association of general construction contractors with approximately 7,950 members in the United States. The general construction industry as a whole employs approximately 3,500,000 workers and annually performs contracts in the amount of $96,000,000,000. Members of the AGC annually perform contracts in the amount of $75,000,000,000, or approximately 80 per cent of the construction in the industry.[1] AGC members directly employ on their own payrolls approximately 1,000,000 workers.

Almost all of the contractors which are members of the AGC are affiliated with local chapters of the AGC. There are 130 such chapters, statewide or metropolitan in their jurisdiction. At least one such chapter exists in each of the 50 states. In addition to the approximately 7,950 general contractors which are members of the AGC and its local chapters, there are numerous nongeneral contractors—contractors in the mechanical, electrical or other specialized fields—which hold associate membership in the local chapters of the AGC but are not members of the national AGC.

STATEMENT OF POSITION

The petition of Nello L. Teer Company, a member of the AGC, raises an issue of concern to the AGC and of substantial importance to government contractors in general, for as a result of the decision of the Court of Claims in the case at bar the contractual safeguards which heretofore have enabled the govern-

[1] In 1965, AGC members performed government contracts in the amount of approximately $20,000,000,000.

ment contractor to support the estimates of labor costs upon which his bid was predicated have been destroyed. The Court of Claims held that the appropriate classification of workers employed on the project was not an issue cognizable under the standard Disputes clause of the contractor's contract with the United States, but instead was a matter properly referrable to the Solicitor of Labor for decision. Under the standard Disputes clause, an aggrieved contractor has the right to be heard by and the opportunity to present evidence on his behalf to a contract appeals board. Under the arrangement sanctioned in this case by the Court of Claims, the contractor has no contractual or statutory right whatsoever to present evidence or to be heard. No matter how arbitrary the classification of workers imposed by the Department of Labor may be—and in the instant case the classification which the contractor was forced to accept was plainly at variance with prevailing practice in the locality—the Court of Claims seems to have choked off any hope of judicial redress.

The procedure surrounding classification questions would be important if for no other reason than the frequency with which such questions arise. Indeed, on virtually all large construction projects, there are instances of either classifications omitted from the wage determination or questions as to which of two listed classifications embraces the workers in issue. In fact, there is a standard form "Request for Authorization of Additional Classifications" generally available for contractors to submit to the contracting officer after the performance of the contract has begun (see Pet. 10a).

By its removal of channels of appeal from the contractor, the Court of Claims—apart from negating

what heretofore had been regarded as a contractual right—has injected a chaotic element into the bidding, to the detriment of the contractor and the public. The rationale for competitive bidding in government contracts is that the government, and thus the public, benefits by securing the lowest price for required construction consistent with sound performance and, with respect to the labor provisions of the contract, consistent with prevailing wage practices. If, however, the contractor is to be exposed to additional risks through an inability to challenge classifications imposed by administrative fiat, he must take this into account as a contingency for bidding purposes—and accordingly include a reserve for such a contingency in his bid. The inflationary tendencies of such an approach are obvious, and particularly unfortunate in that the terms of the usual construction contract—until the Court's decision—had seemed to obviate the necessity for any such apprehension on the part of the contractor.

REASONS FOR GRANTING THE WRIT

1. As the number and dollar volume of federal or federally assisted construction contracts spiral to truly staggering proportions—and the likelihood of administrative error by the overworked and undermanned staff of the Solicitor of Labor becomes commensurately greater—the need to safeguard contractors against administrative excesses would appear to be more important than ever. In 1965, contracts containing prevailing wage determinations by the Secretary of Labor amounted to approximately $20,000,000,000. As recently as 1961 the burden of turning out the vast number of wage determinations for incorporation in government contracts rested on a staff of only 19 pro-

fessional employees in the Department of Labor (see Pet. 18).

The task of correctly classifying employees at work on projects is wholly different, and often far more elusive, than the determination of a prevailing minimum wage for established classifications. The ascertainment of a prevailing minimum, viz., the determination that the going rate for plumbers is $4.50 rather than $4.25, is, or should be, a statistical process initiated by a tally of wage rates for persons performing work of the type in issue within the appropriate geographic boundaries. This has historically been the province of the Secretary of Labor, since the inception of the Davis-Bacon Act.

Questions of classification present quite different considerations, for a summing up of all wage rates paid plumbers sheds no light on whether the employees at work on the project are performing the tasks of plumbers or pipelayers. Indeed, only by an on-site examination and analysis of the work which they are in fact performing, and the nature of the particular construction in which they are engaged, can any meaningful classification decision be made. Hence for a number of years it was believed that the determination of the proper classification of employees was not a matter for the Department of Labor at all, but rather one for the official on the construction site—the contracting officer, whose function it is to oversee the performance of the contract and to deal with disputed questions of fact that arise during the course of the work.

In recent years the Secretary of Labor has claimed the authority to make determinations of classification—

although such authority is nowhere set forth in the Davis-Bacon Act or other statute—and had met with some, but spotty success, in persuading the contracting agencies to refer such questions to him or to defer to his rulings (see cases at Pet. 24-27). Not until the case at bar was such authority recognized by a federal court, which it may be noted, not only recognized such authority in the Secretary of Labor, but found that decisions made thereunder were final and immune from judicial review. That the decision of the Court of Claims is acknowledged to be the definitive word on the subject is manifested by the acquiescence of the Comptroller General—long an opponent of the Secretary's seizure of authority in this area—in the Court's decision that the Secretary's disposition of classification questions is not reviewable. See Decision B-154253 of Comptroller General (Dec. 1965).

2. Wholly apart from the recognition of the Secretary's authority to classify employees, the placing of *final* authority in the Secretary deprives the contractor of contractual safeguards heretofore thought to protect him against administrative abuses. The contractor heretofore had a right to be heard with regard to *any* disputed questions of fact arising out of the contract. The invitation for bids contains standard advice to the contractor that he should make an on-site inspection "to ascertain pertinent local conditions readily determined by inspection and inquiry, such as . . . labor conditions" (Pet. 114a). The contractor is thus put on notice that he cannot disregard with impunity the actual conditions existing at the site, and in calculating the costs of performing the work bears responsibility for any judgments—or misjudgments—that he might make. His protection, however, lies in

his access to procedures under the standard Disputes clause of the contract and the rights accorded therein to present evidence in his behalf.

Such protection—the right to be heard—is essential in cases where the appropriate job classification is in issue, for the classification of employees is not self-evident from a reading of the terms of the contract. Unlike the wage rate applicable to a particular classification, where the rate appears clearly and unambiguously on the face of the contract, the proper classification must be selected by the contractor from a listing of a number of classifications, or it may not be listed at all because of error or oversight, and need to be added once the work is under way. Frequently, as in the first wage determination in the case at bar, rates for the entire schedule of crafts (including crafts which have no conceivable relation to the project at hand) are requested by the contracting agency, furnished by the Department of Labor, and incorporated *in toto* in the contract.

The salient point is that the contractor must make his estimate of labor costs on the basis of his pre-bid investigation, and select what he believes to be the appropriate classification on the basis of the knowledge gained in the course of the investigation. The contract tells him only what rate must be applied if a particular classification is used; it does not specify what classifications are to be employed in accordance with local practice.

Hence it is the height of incongruity to compel a contractor to make his estimates of labor costs at his peril, and thereby absorb the liability of increased costs if his judgment is wrong, but to deprive him of

a forum to hear the evidence he has to support his appraisal. As it now stands in the light of the Court of Claims decision, the Disputes clause in the contract is deemed inapplicable to a type of dispute which occurs frequently and which may involve substantial cost to the contractor. Yet a dispute over proper classifications no less than one over material specifications, is a factual issue properly cognizable under the Disputes clause. Inasmuch as the typical Disputes clause explicitly provides the right to be heard and to offer evidence with regard to any disputed question of fact, the deprivation of such rights solely because the dispute involves the cost of labor rather than other costs of performance seems an unwarranted and ill-advised exception.

Moreover, the singling out of classification questions as non-reviewable would appear to fly in the face of the Wunderlich Act (Pet. 113a), which provides that decisions by "the head of any department or agency" shall not be immune from review. In the absence of compelling proof of Congressional intent to deprive the contractor of review in classification matters, i.e., to qualify the Wunderlich Act, his right to present evidence on the record in support of his petition, and to secure review by a court, should not be undermined.

3. Not only the contractor, but in the long run the public itself, will be adversely affected by the Court of Claims holding. The public interest is best served, we submit, where competitive bidders can bid realistically on the basis of known conditions, and speculation and contingencies can be kept to a minimum. On that basis the cost of construction, and hence the contract price, can be kept at a realistic level consist-

ent with sound performance, the meeting of prevailing wage scales, and a reasonable profit to the contractor. Particularly where federally financed construction has reached so large a scale as it has today, there is a need to restrain inflationary tendencies in the bidding and price of construction. It is the public, the taxpayer, who benefits thereby.

Where the contractor is subject to contingencies wholly beyond his control, a measure of instability is added to the bidding procedures. Sensible bidding, in an area as subject to hazards of performance as construction, requires that the contractor take into account, and provide for, contingencies over which he has no control, or concerning which he has no voice. The prudent bidder, aware that the evidence of labor costs that he has gathered in his pre-bid investigation might well be valueless, must either assume for bidding purposes that the higher paid of two possible classifications will be utilized or in any event include some reserve for that contingency. Thus a chaotic element is injected into the bidding, with a resultant inflation of the bid price.

This is particularly unfortunate in that it should be unnecessary, and would be unnecessary if the contractor were at least assured that he would have the opportunity to present his views to the forum that would pass upon his obligation. Under the law of the case at bar, however, the contractor's liability can be resolved by an *ex parte* declaration on the part of the Department of Labor, which can exclusively and finally impose the classification that it, for reasons satisfactory to itself, selects.

CONCLUSION

In view of the importance of the issue raised in this case to government contractors and to the public, the AGC urges that the petition for a writ of certiorari be granted.

Respectfully submitted,

TRAVIS BROWN
1957 E Street, N. W.
Washington, D. C. 20006
Counsel for the Associated General Contractors of America

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